4850. Misbranding of tankage. U. S. v. Swift & Co., a corporation. Tried to the court and jury. Verdict of guilty. Fine, $150. (F. & D. No. 6408. I. S. No. 9138-e.)

On November 19, 1915, the United States attorney for the District of New Jersey, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Swift & Co., a corporation, with a place of business at Newark, N. J., alleging shipment by said company, in violation of the Food and Drugs Act, on or about January 16, 1913, from the State of New Jersey into the State of Maryland, of a quantity of tankage which was misbranded. The article was labeled: "100 Lbs. Swift's Digester Tankage. Guaranteed Analysis:—Protein 60% to 70%; Phosphate 6 to 8%—Manufactured by Swift & Company, Harrison Station, Newark, N. J."

Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results:

Moisture (per cent)	4.71
Protein (per cent)	43.75

Misbranding of the article was alleged in the information for the reason that the following statement appearing on the label aforesaid, "Protein 60% to 70%," was false and misleading in that it indicated to the purchasers thereof that the article contained from 60 to 70 per cent of protein, and for the further reason that it was labeled "Protein 60% to 70%" so as to deceive and mislead the purchasers into the belief that it contained from 60 to 70 per cent of protein, when, in truth and in fact, it did not, but contained a less amount thereof, to wit, 43.75 per cent of protein.

On May 12, 1916, the case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Haight, *D. J.*):

Gentlemen of the jury: The defendant, Swift & Company, is charged with having violated the National Pure Food and Drugs Act, with which generally, no doubt, all of you are familiar, both as respects its general scope and the purpose for which it was enacted. I shall not, therefore, endeavor to explain the many features of the act to you.

It appears that on January 17 or 18, 1913, Swift & Company shipped to a concern at Baltimore, Maryland, a certain number of boxes containing "digester tankage," and on those boxes they caused to be written or labeled that the products therein contained protein to the amount of from 60 to 70 per cent. These facts are not disputed at all; they are admitted. The Government contends that this tankage did not in reality contain protein to the extent of from 60 to 70 per cent, but that the amount of protein, or the percentage of protein, in the tankage was much less, it having been testified by the witnesses for the Government that the three examinations which were made for the purpose of ascertaining the amount of protein resulted as follows: In the analysis which was made in the summer—I think it was in July—of 1913 the tankage was found to contain protein to the extent of 44.19 per cent. At the examination that was made on November 6, 1913, it was found that the protein in the tankage was 44.75 per cent; and then at the subsequent analysis, which was made by Mr. Bidwell, in January of 1914, it was found that the protein in the tankage was 43.19 per cent.

Now then, it is admitted that this tankage was shipped from one State to another. That is a necessary element of the crime charged—that it be shipped from one State to another—namely, from the State of New Jersey to the State of Maryland. It is also admitted that the bags in which the tankage was contained purported to be and were in fact labeled so as to convey to a person who looked at it information that the amount of protein in the tankage was from 60 to 70 per cent. The only question to be decided is this: What amount of protein did it contain at the time it was shipped—namely, in January of 1913? If it contained less at that time than the 60 to 70 per cent, which is the amount mentioned on the labels of the bags in which the tankage was

packed, then the defendant is guilty. If it did not contain less than the 60 to 70 per cent, then the defendant is not guilty. So, gentlemen, you have only that simple question to determine.

Now, then, the defendant finds itself in an embarrassing position by reason of its inability to get a witness, and has not been able to, at any rate has not, produced any evidence as to the amount of protein that was in this tankage at the time it was shipped. Nor, for that matter, has the Government, and necessarily so, been able to produce any direct evidence as to the amount of protein that was in the tankage at the time it was shipped, because the Government did not and indeed could not at that time make an analysis of it. But in the July succeeding the time of the shipping of the tankage, which was about six months thereafter, an analysis was made of some samples of the tankage, which admittedly had been taken by the Government from these bags, and it was then found that it contained a far less amount of protein than the amount stated on the bags in which it was.

You have heard the evidence of the Government's chemists as to the condition of the tankage as they found it, and the unlikelihood that the amount of protein in the tankage could have been materially changed by any conditions that may have existed between the time of shipping and the time of the analysis; and therefore if you find from the evidence in the case that there is nothing to account for the difference in the amount of protein stated on the labels and the amount of protein that the Government chemists state they found, then your verdict will be that the defendant is guilty. If on the other hand you are not convinced from the evidence that the amount of protein that the tankage was found to contain in July, or at the time of any of these examinations, fairly represents the amount of protein it contained in January, then your verdict will be that the defendant is not guilty.

As this is a criminal case the general rule of the criminal law is applicable to it; that is, that every man is presumed to be innocent until he is proven guilty. The burden of proving that the defendant is guilty beyond a reasonable doubt rests upon the Government. I do not mean by that that a person in order to be found guilty must be proven guilty beyond all doubt, but only beyond a doubt based upon reason and arising from evidence; not a doubt that is merely captious or capricious, but a doubt which prevents you, upon all the evidence that you have, from having an abiding conviction of the guilt of the defendant, or saying that you are convinced of its guilt to a moral certainty. If under those circumstances you have a reasonable doubt of the guilt of the defendant, then your verdict must be not guilty.

The jury thereupon retired, and, after due deliberation, returned into court with its verdict of guilty, and the court imposed a fine of $150.

CARL VROOMAN,
Assistant Secretary of Agriculture.